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No. 77-365

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

LASALLE NATIONAL BANK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Respondents (Br. in Opp. 13-14) attempt to reconcile the decision below with *Donaldson* v. *United States*, 400 U.S. 517, by arguing that this case turned on the testimonial credibility of the special agent who issued the summonses. In support of this contention, they cite the statement of the court of appeals that "Special Agent Olivero testified that he was pursuing a civil aspect, but the record establishes that the district court did not believe him" (Pet. App. p. 18a). In the court of appeals' view, "the use of an administrative summons solely for criminal purposes is a quintessential example of bad faith" (Pet. App. B, p. 19a).

But the refusal of the courts below to enforce the summonses issued prior to a recommendation for criminal prosecution cannot be reduced to a question of the credibility of the special agent. In *Donaldson* v. *United*

States, supra, 400 U.S. at 536, this Court held that "under §7602 [of the Internal Revenue Code] an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution."[1] As the Court there recognized, there is no valid distinction between a civil and a criminal investigation for purposes of the enforceability of an internal revenue summons. The critical distinction established by *Donaldson* is between a summons issued before the Internal Revenue Service has recommended criminal prosecution to the Department of Justice and a summons issued after such a recommendation.

Thus, there was no occasion for the district court to reject the credibility of the special agent's testimony that there were civil aspects to his investigation. The Internal Revenue Service is the agency charged with the administration and enforcement of the tax laws (see 26 U.S.C. 7801) and every investigation, whether it is conducted by special agents or revenue agents, has as one of its purposes the collection of revenue. Since the Internal Revenue Service had not recommended prosecution of any individual prior to the special agent's issuance of the summons, "the civil aspects [of the investigation] * * * [were] inextricably associated with the criminal." *United States* v. *Billingsley,* 469 F. 2d 1208, 1210 (C.A. 10). Under the objective standard of *Donaldson,* the summonses were therefore enforceable even though the special agent might uncover evidence of criminal conduct.

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[1]In our petition (p. 6), we inadvertently omitted the phrase "in aid of an investigation" from the quotation of the *Donaldson* holding. Although respondents argue (Br. in Opp. 7) that the omission was "crucial to the context and meaning of the quoted language," we do not believe that it affects our argument that the court of appeals misapplied the *Donaldson* standard.

2. The language of Section 7602 and its legislative history confirm that Congress intended that an internal revenue summons could be issued in aid of a tax fraud investigation without requiring any appraisal of the relative weight of the civil and criminal aspects of the investigation. "There is nothing in the language of § 7602 to limit the issuance of summonses to civil investigations." *Donaldson* v. *United States, supra,* 400 U.S. at 537 (Douglas, J., concurring). Moreover, Section 3654 of the 1939 Code, a statutory predecessor of Section 7602, provided that "every collector * * * shall aid in the prevention, detection, and punishment of any frauds * * *. For such purposes, he shall have the power * * * to summon any person to produce books and papers."[2] Upon reenacting the summons power in Section 7602 of the 1954 Code, the responsible committees stated that Congress intended "no material change from existing law." H.R. Rep. No. 1337, 83d Cong., 2d Sess., p. A436 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 617 (1954).

There is accordingly no basis for the court of appeals' conclusion that special agent Olivero "was at all times involved in a criminal investigation, at least in Olivero's mind" (Pet. App. B, p. 8a). Under *Donaldson,* the subjective intent of the agent issuing a summons prior to a recommendation for prosecution is irrelevant because his inquiry necessarily involves questions of civil tax liability. Thus, in a summons enforcement proceeding, the summons will meet the *Donaldson* standard if the Commissioner shows "that the investigation will be

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[2]This statute was derived from an essentially identical provision first enacted in 1868. Act of July 20, 1868, c. 186, 15 Stat. 125, 144, Sec. 49, and codified as part of Section 3163 of the Revised Statutes of 1874.

conducted pursuant to a legitimate [statutory] purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." *United States* v. *Powell*, 379 U.S. 48, 57-58. See also *Donaldson* v. *United States, supra*, 400 U.S. at 526-527; *United States* v. *Kordel*, 397 U.S. 1, 11-12.

For the reasons stated above and in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

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